LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 20 1968
JOHN F. DAVIS, CLERK

Petition for Writ of Certiorari

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1968

No. 217

DUANE JOHNSON, *Petitioner*

vs.

BENBROOK WATER AND SEWER AUTHORITY, *Respondent*

Petition for Writ of Certiorari to The Supreme Court of Texas and Second Court of Civil Appeals of Texas

HOOPER, STEVES & KERRY
200 Fort Worth Club Building
Fort Worth, Texas 76102
HENRY E. KERRY
DAVID F. CHAPPELL
Attorneys for Petitioner

NIEMANN & NIEMANN
505 International Life Building
Austin, Texas
LARRY NIEMANN
Of Counsel

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-4070

TABLE OF CONTENTS

Page

PETITION FOR WRIT OF CERTIORARI:

Opinions Below 1

Jurisdiction 2

Questions Presented for Review 2

Constitutional Provisions Involved 3

Statement of the Case 4

Rulings Upon Federal Questions Below 5

Argument—Reasons for Granting Writ:

I. The Authority's action requiring the Developer to pay for all the costs of extensions to the Authority's system and to turn over fee simple title of that system, constitutes a "taking without compensation" as prohibited by the Fourteenth Amendment to the United States Constitution 7

II. The Authority's action denies the Developer the Equal Protection of the Law as guaranteed by the Fourteenth Amendment 13

III. The Authority disobeyed the rulings of this Court by failing to even consider the Developer's application 20

Conclusion 24

APPENDIX A—FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DISTRICT COURT, TARRANT COUNTY, TEXAS 27

APPENDIX B—OPINION OF THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS 34

APPENDIX C—ORDER OF THE SUPREME COURT OF TEXAS REFUSING APPLICATION FOR WRIT OF ERROR 43

APPENDIX D—RULES & REGULATIONS, BENBROOK WATER & SEWER AUTHORITY 44

TABLE OF CITATIONS

Cases: Page

Bragg v. Weaver, 251 U.S. 47 (1919) 22

Browning v. Hooper, 269 U.S. 396 (1926) 23

California Electric Power Company v. United States, 60 F.Supp. 344 (1945) 9

City of DePere v. Public Service Comm., 63 N.W. 2d 764 (Wis., 1954) 19

Derby Heights, Inc. v. Gantt Water and Sewer District, 116 S.E. 2d 13 (1960) 11, 12

Filger v. Public Water Supply, 346 S.W. 2d 567 19

Green v. San Antonio Water Supply, 193 S.W. 453 (Tex.Civ.App., 1917) 9

Hartford Steam Boiler Inspection and Insurance Company v. Harrison, 301 U.S. 459 (1937) 16

Johnson v. Reason, 392 S.W. 2d 54 (Court of Appeals-Kentucky-1965) 18

Leonard v. Town of Waynesboro, 193 S.E. 503 (1937) 11

Londoner v. Denver, 210 U.S. 373 (1908) 22

Morgan v. United States, 304 U.S. 13 (1937) 21

Parker v. Hester, 277 F. 2d 708 (9th Circuit, 1955) 24

Reagan v. Farmer's Loan & Trust Company, 154 U.S. 362 (1894) 8

Reid Development Company v. Parsappony-Troy Hills Township, 89 A. 2d 677 (1952) 18

Rinaldi v. Yeager, 384 U.S. 305 (1966) 16

Rutan Estates, Inc. v. Town of Belleville, 152 A. 2d 853 (N.J., 1959) 19

Selected Investment Corp. v. City of Lawton, 304 P. 2d 967 (1956) 12

TABLE OF CITATIONS (Continued)

Page

Southern Railway Co. v. Virginia ex rel Shirley, 290 U.S. 190 (1933) 8

Styers v. City of Gastonia, 114 S.E. 2d 348 (1960) 11

Sunday Lake Iron Company v. Township of Wakefield, 247 U.S. 350 (1918) 16

U. S. v. Causby, 328 U.S. 256 (1945) 8

United States v. Sponenbarger, 308 U.S. 256 (1939) 9

Wichita Finance and Thrift Company v. City of Lawton, 131 F.Supp. 788 (W.D. Okla., 1955) 10

Wolfe v. People of State of Colorado, 338 U.S. 25 (1949) 21

Statutes and Constitutional Provisions:

Fourteenth Amendment of the Constitution of the United States of America 3

28 U.S.C., Section 1257 (3) 2

28 U.S.C., Section 2101 (c) 2

Article 8280-163, Vernon's Annotated Civil Statutes of Texas 4

Petition for Writ of Certiorari

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1968

No. _____

DUANE JOHNSON, *Petitioner*

vs.

BENBROOK WATER AND SEWER AUTHORITY, *Respondent*

Petition for Writ of Certiorari to The Supreme Court of Texas and Second Court of Civil Appeals of Texas

Petitioner, Duane Johnson, respectfully prays that a writ of certiorari issue to review the opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and order of the Supreme Court of Texas adopting said opinion by refusing to review said opinion upon application for writ of error, indicating that the honorable Court of Civil Appeals committed no *reversible* error.

Opinions Below

Jurisdiction

OPINIONS BELOW

The findings of fact and conclusions of law of the trial court, the 96th District Court of Tarrant County, Texas, is appended to this petition as Appendix A.

The opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas appears at 410 S.W.2d 614, and is appended to this petition as Appendix B.

The order of the Supreme Court of Texas refusing application for writ of error with the notation "no reversible error" is appended to this petition as Appendix C.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. Sec. 1257 (3), in that the Petitioner claims a violation by Respondent of the due process of law and equal protection of the law clauses guaranteed Petitioner under the Fourteenth Amendment to the Constitution of the United States.

The order of the Supreme Court of Texas refusing a writ of error to review the opinion of the Second Court of Civil Appeals is dated April 3, 1968. This petition is filed within 90 days as required by 28 U.S.C., Sec. 2101 (c), all state remedies having been exhausted.

Questions Presented

QUESTIONS PRESENTED FOR REVIEW

(1) Can the Benbrook Water and Sewer Authority, Respondent, require the developers, if they are to have water and sewer service, to construct at their own cost all necessary water and sewer mains and then deliver

title to this revenue producing capital asset to the Authority, all without cost to the Authority?

(2) a. Can the Authority favor local homeowners as against outside developers by granting the local homeowners a reimbursement program for the cost of extensions, while denying the same benefit to the outside developer?

b. Can the Authority favor prior applicants for service as against current applicants by paying part of prior extensions and refusing to pay any of the current expenses for extension?

(3) Can the Authority deny the Developer a chance to be heard on the allocation of the costs of an extension to the Developer's property?

Constitutional Provisions Involved

Statement of the Case

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the Constitution of the United States provides:

> *"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."*

STATEMENT OF THE CASE

In an example of bureaucracy at its worst the Benbrook Water and Sewer Authority devised a financing plan which not only takes property from the developers without any compensation, but also discriminates against the developer in favor of the local landowner and prior subscribers, all without granting the developer the courtesy of even an ex parte hearing.

Petitioner, Duane Johnson, engages in the building trade as a contractor and developer who for many years engaged in sub-dividing, development and building in and near the City of Benbrook, Tarrant County, Texas. Respondent, Benbrook Water and Sewer Authority, serves as a corporate body politic under and by virtue of Article 8280-163, *Vernon's Annotated Civil Statutes* of the State of Texas, as passed by the 54th Legislature of the State of Texas in 1955.

For convenience sake, the parties will be referred to as they were in the trial court where the Petitioner was referred to as the Developer and the Respondent was referred to as the Authority.

Basically, the suit requests damages accruing as a result of the taking of the Developer's property by a governmental entity, the Authority, without just compensation. Developer must, if he is to have water and sewer service, construct at his cost all necessary water and sewer mains and then deliver title to this revenue producing capital asset to the Authority, all without cost to the Authority. (Policies & Procedures, Ben-

brook Sewer & Water Authority, Section IV, S.F. Vol. II)

The rules and regulations of the Authority provide that applicants be classified as either "developers" or as "single customers" and "groups of single customers". The classification rests solely in the discretion of the Authority. Once classified as a "single customer" or a "group of single customers", the applicants become eligible for a reimbursement program whereby the Authority will rebate to the applicant the cost of the extension as new home owners move in and tap onto the extension (see Appendix D, Rules and Regulations, Benbrook Sewer & Water Authority, Sec. 3). Petitioner requested such a reimbursement program but as "the benefits of the section are not available to developers" the Authority denied the request by simply ignoring it. (S.F. 311, 312, 321)

The injury is compounded by the fact that the Authority refuses to finance any of the costs of the extension even though their audit indicates that the Authority financed over one-sixth (1/6) of prior extensions. (Exhibit Vol. C)

RULINGS UPON FEDERAL QUESTIONS BELOW

Petitioner filed this suit in the 96th District Court of Tarrant County, Texas, for Declaratory Judgment that his property rights were taken without due process of law and that the Authority classified him in a discriminatory manner so as to deny him the equal protection of the law. Since Petitioner deposited the

cost of extending the facilities with the Authority without prejudice to his right to obtain reimbursement, Petitioner also requested a Writ of Mandamus directing the Authority to start a reimbursement program.

The trial occurred on March 8, 1966, a jury was waived, and the Court rendered for the Authority as found in the attached Exhibit A, Findings of Fact and Conclusions of Law. In specific the trial court found the following conclusions of law:

> *"(4) The Defendant's policies and procedures which have been in effect at all times material to this law suit are not arbitrary, unreasonable, capricious and/or discriminatory.*
>
> *(6) There has been no confiscation of Plaintiff's property by defendant without due process of law.*
>
> *(7) The Plaintiff has not been denied by Defendant equal protection of the law."*

The Court of Civil Appeals for the Second Supreme Judicial District of Texas which affirmed the Judgment of the trial court, answered Petitioner's question inquiring whether he was denied due process of law or equal protection of the laws, with a simple "we think not" (410 S.W.2d at 647—see Appendix B).

The Texas Supreme Court refused to grant writ of error and consider the case. Petitioner perfected his constitutional question by points 19, 23, and 35 in the application for writ of error, stating:

> *"(19) The Court of Civil Appeals erred in hold-*

ing that there has been no confiscation of Developer's property by the Authority without due process of law.

(23) The Court of Civil Appeals erred in holding that the Developer had not been denied equal protection of the law by the appellee.

(35) The Court of Civil Appeals erred in failing to hold that the policies now under consideration violate the procedural due process clauses of the State and Federal Constitutions."

ARGUMENT—REASONS FOR GRANTING WRIT

I. *The Authority's action requiring the Developer to pay for all the costs of extensions to the Authority's system and to turn over fee simple title of that system, constitutes a "taking without compensation" as prohibited by the Fourteenth Amendment to the United States Constitution.*

The Benbrook Water and Sewer Authority wrestled property from the Developer without just compensation by passing an Administrative Rule which says in affect:

(1) Property owners shall hereafter pay for, construct and make a gift of all on-site water and sewer mains.

(2) Such utility extensions shall thereupon become part of the capital assets of such utility, and the Authority shall thereafter be entitled to all revenues from the sale of water and sewerage services.

(3) Even though the property owners pay for such

water and sewerage lines such owners shall receive no compensation from the Authority when ownership of the lines is transferred to the Authority.

The effect of such a rule is a "taking" which fails to grant "just compensation".

No doubt the administrative rule constitutes a "taking" of property for if the Petitioner wishes to develop his property in practically any manner he must give the Authority part of his land and pay them for taking it.

> *"There can be no doubt of their (a Court's) power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to right of property, and if found so to be, to restrain its operation." Reagan v. Farmer's Loan and Trust Company*, 154 U.S. 362, 397 (1894).

A "taking" occurs with "a direct and immediate interference with the enjoyment and use of the land." *U.S. v. Causby*, 328 U.S. 256, 266 (1945). Such a taking occurs when an agency requires an outlay of money by a property owner in order to develop his land. This Court so held in *Southern Railway Co. v. Virginia ex rel Shirley*, 290 U.S. 190 (1933), when an agency required certain construction before a property owner could develop his land for railway purposes. The Court stated at page 194:

> *"Certainly to require abolition of an established grade crossing and the outlay of money necessary to construct an overhead would take the railway's*

property in a very real sense. This seems plain enough both upon reason and authority."

Nor does the claim that the Developer contracted to convey the property answer our grievance. The monopoly of the utility creates such an economic duress as to destroy any element of voluntariness. The Court of Claims so held in *California Electric Power Company v. United States*, 60 F.Supp. 344 (1945), where it stated at pages 359 and 360:

". . . The Plaintiff says that it did not make the agreement voluntarily, but made it as a result of economic duress. We agree with the Plaintiff . . . one who has a right to obtain a service from a public utilty, for which service there is a charge fixed by law, cannot estop himself from challenging a higher charge by an agreement to pay it."

Even the Texas courts held long ago that a contract is not voluntary when a property owner must accept it in order to receive a governmental service. E.g., *Green v. San Antonio Water Supply*, 193 S.W. 453 (Tex.Civ. App., 1917) no writ hist.

And so the rule is, "(t)he Constitutional prohibition against uncompensated taking of private property for public use is grounded upon a conception of the injustice in favoring the public as against an individual property owner." *United States v. Sponenbarger*, 308 U.S. 256, 266 (1939).

But the really important question is not whether a "taking" occurred, but whether the Developer received "just compensation" for his property. The de-

veloper does not quarrel with the proposition articulated by the Texas Court of Civil Appeals, that the Authority may constitutionally require the developer to pay for the pipes and mains he receives and the labor necessary to install them. But we vigorously attack the idea that once the developer buys the water and sewer system he *must* convey it to the Authority absolutely free of charge! The Authority in the fullest sense of the word "takes" a revenue producing asset from the developer without any compensation.

In contrast to the Authority's position nearly all non-Texas authorities which have considered the question of constitutionality concluded that it would be a violation of the constitutional guarantees against "taking property without compensation and without due process of law". The recent federal case of *Wichita Finance and Thrift Company v. City of Lawton*, 131 F.Supp. 788 (W.D. Okla., 1955) hits directly at the type of expropriation involved here. The developers there, as here, purchased and installed the water mains. The City took possession of the system and agreed to purchase it from the developer on a monthly installment basis. After respecting these contracts for several months the city declined to continue the purchase and refused to return possession of the system to the developers. Thus the identical problem occurred —can a city constitutionally require developers to convey a water system to that city without any compensation—the Court said NO! at page 790:

> *"When the city asserted hostile ownership of the watermains . . . , it committed an act of conver-*

sion. It could not take private property for public use without compensation. 5th Amendment to the Constitution of the United States;

* * *

It paid nothing for these lines, and has thereby been unjustly enriched, and must answer in damages for their wrongful conversion."

Likewise, the South Carolina Supreme Court in the case of *Derby Heights, Inc. v. Gantt Water and Sewer District*, 116 S.E.2d 13 (1960), held that where developers had installed water lines at their own expense and the Water District thereafter extended its boundaries and took over possession and operation of these water lines, such conduct constituted an unconstitutional taking of private property for public use without just compensation.

In a similar vein, the Virginia Supreme Court in *Leonard v. Town of Waynesboro*, 193 S.E. 503 (1937), stated at page 506 that:

"Where a town takes over and controls a water line built by others and uses it for the benefit of the town and consumers, generally, and through it delivers water for profit, it is obligated to pay, on a quantum meruit, those who constructed the line."

The North Carolina Supreme Court in *Styers v. City of Gastonia*, 114 S.E.2d 348, 350 (1960), considered a case involving water mains installed in a subdivision by a developer outside the city limits pursuant to an agreement that the city would refund the water main costs when the subdivision was taken within the

city limits. The court held at page 350 that, although the agreement to reimburse was void, the city would be liable to pay for the water lines:

> *"The liability (to pay the developers for the lines) arose when, and only when, the city appropriated plaintiff's property to its own use. This apropriation imposed on it a duty to pay the fair value to the property taken."*

The Authority maintains that the developers will nontheless be compensated by the buyers to whom they sell the lots. This argument that the state is relieved of the onus of a governmental taking without compensation if the citizens can pass the loss onto some other citizen, is somewhat devoid of logic to say the least. Furthermore, the case authorities have rejected the argument.

The Oklahoma Supreme Court held that where a developer had installed pipes and other equipment for distribution of water in lands owned by it, the developer could not be divested of his property rights in such water mains "on the fabricated or fictional ground of a presumption that the loss thereof was figured proportionately to the increased value thereby given each of the lots or residences." *Selected Investment Corp. v. City of Lawton*, 304 P.2d 967 (1956) at page 973.

Also in *Derby Heights, Inc. v. Gantt Water and Sewer District*, 116 S.E.2d 13 (1960), the Supreme Court of South Carolina held that where developers laid water mains at their own expense the mere fact that the developers considered the cost of the lines

when they fixed prices for the lots did not preclude them from recovering just compensation for the taking of such mains.

The real irony of this argument is that the Authority does not contest the fact that there has been a wrongful taking without just compensation, but merely claims that the developer is not wronged as he may pass this cost on to others. Such an analysis is speculative in nature and fails to take into consideration the practical realities of competition. In any event, passing the cost on to the lot buyer would not eliminate the wrong—but rather it would merely shift the burden of the wrong to someone else.

II. *The Authority's action denies the Developer the Equal Protection of the Law as guaranteed by the Fourteenth Amendment.*

The Authority discriminates against the Developer by arbitrarily favoring both prior and other present subscribers to the Water and Sewer System and thereby disregarding the Petitioner's rights under the Equal Protection Clause of the United States Constitution.

The Board of Directors of the Authority classifies, at its complete discretion unfettered by any guide lines, an applicant or group of applicants requesting an extension of the system, as a "single customer or group of single customers", or alternatively as a "developer". A classification of "single customer or group of single customers" establishes eligibility for a reimbursement program, whereby the Authority will

rebate to the applicant the cost of the extension as new home owners move in and tap onto that extension. However, "the benefits of this section are not available to Developers". (Benbrook Water & Sewer Authority, Policies & Procedures, Section 3, see Appendix D). Petitioner's request for such a reimbursement program was denied without even an ex parte hearing on the ground that he was a developer. (S.F. 311, 312, 321)

The Developer also requested the Authority to share at least part of the cost of the extension. The Auditor's reports (Exhibit Volume C) shows that the Authority bore over one-sixth (1/6) ($100,000.00) of the expense of total prior extensions by bonds and other revenues. The Authority compounded their error by denying the Petitioner's reasonable request for such equal treatment.

The discriminatory effects of classifying one group of current applicants as "single or group of single customers" and the other group as "developers" easily appears. The developer receives no reimbursement funds from the Authority, while the "single customer" receives such rebates. The discriminatory effect of arbitrarily distinguishing between prior and current applicants fails to manifest itself as easily. However, upon careful examination of this classification, the discriminatory effect becomes apparent.

Earlier customers of the Authority derived the benefits of the extension of the system by the use of financing obtained by issuance of bonds. Some prior extensions were made on certain streets in certain

blocks at no cost to the Developer and/or the individual home owner (S.F. 92-93, 169). Now, portions of revenues derived from "all of the customers" of the Authority throughout its geographical boundaries are allocated toward the retirement of those earlier bonds and a payment of interest thereon. The new customers obtained by the Authority as a result of this Developer's extensions will likewise pay a rate, a portion of which will be directed toward the retirement of those earlier bonds. In addition to that, however, this Developer will, under the Authority's policies, deliver over to and make a contribution to the Authority of the new mains, those here involved, and will, in effect, be paying not only for the main but also for the retirement of bonds which went toward the financing of the old mains. Clearly, this is an arbitrary and wholly discriminatory policy. If, in fact, the burden were equalized so that the older customers were paying a rate directed toward the financing of the entire system, and the new customers were doing likewise, there would be no room for argument of discrimination.

Both of these arbitrary classifications demonstrate the denial of similar treatment of like individuals required by the Equal Protection Clause of the Fourteenth Amendment.

> *"It may be said generally that the Equal Protection Clause means that the rights of all persons must rest upon the same rule under similar circumstances * * * and that it applies to the exercise of all the powers of the State which can effect the individual or his property, including the*

power of taxation." Hartford Steam Boiler Inspection and Insurance Company v. Harrison, 301 U.S. 459 (1937) at page 461.

Such discrimination can be "occasioned by expressed terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Company v. Township of Wakefield*, 247 U.S. 350, 352 (1918).

Admittedly the Equal Protection Clause does not forbid classification as such, provided such classifications "are not to be supported by mere fanciful conjecture . . . they cannot stand as reasonable if they offend the plain standards of common sense." *Hartford Steam Boiler Inspection and Insurance Co. v. Harrison*, 301 U.S. 459 (1937) at page 462.

If a classification sustains the burden imposed by the Equal Protection Clause it "must be reasonable, not arbitrary and must rest on some ground of difference having a fair and substantial relation to the *object of legislation*, so that all persons similarly circumstances shall be treated alike." *Ibid.* The crucial question in this case then is does the discriminatory classification into "developer" and "group of single customers" bear a reasonable relationship to the purpose of the ordinance?

This Court held that when a public authority charges the citizenry for services performed, the distinctions made between classes must relate to the services rendered. In *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966), the State of New Jersey provided the service

of preparing appeal transcripts free of charge for indigents. But if the indigent were jailed during the appeal, the State would deduct the $.20 per day jail or prison pay until the printing charges were covered. However, if the indigent were released on probation or suspended sentence, and chose to appeal, the State made no charge for the service of preparing the appeal brief.

This court held that the policy of the ordinance was, as here, that those who received the benefits should pay, Ibid. Yet those who received this identical service from the State failed to be treated alike. Thus a classification occurred, dividing the recipients of this service into two groups, jailed and non-jailed indigents. Such a classification did not relate to the policy underlying the Statute and thereby denied to the Petitioner the Equal Protection of the Laws.

> *"There is no defensible interest served by focusing on that distinction as a classifying feature in a reimbursement statute, since it bears no relationship whatever to the purpose of the repayment provision." Ibid.*

Here, the same policy — those who receive the benefits should pay. Yet two separate sets of classifications exist, both of which discriminate against the Developer.

(1) Current subscribers are discriminated in favor of prior subscribers.

(2) Current developers are discriminated in favor of current single customers or groups of customers.

Do such classifications reasonably relate to the purpose of making those pay for the services who received the benefit? Discrimination between current developers and homeowners was rejected as unreasonable in *Johnson v. Reasor*, 392 S.W.2d 54 (Court of Appeals-Kentucky-1965). There, as here, the question involved whether a utility could give free service to homeowners, while charging developers for the same service. The highest court of Kentucky emphatically answered NO! at page 56:

> *"We believe the city utilities commission cannot follow, as it has done in the case at bar, a plan of making water and light service available cost free to individuals in a subdivision on the basis that they have constructed their own residences in this area and, in the next breath, pursue a scheme of charging all the expense for such utilities to a subdivider who has built a house or houses therein for sale. It is clear that, under such a system, persons who are similarly situated in the subdivision are not being treated alike."*

Discrimination between current and prior subscribers clearly establishes a classification which does not relate to the policy of making those pay who receive the governmental service. The Supreme Court of New Jersey recognized this in the similar case of *Reid Development Company v. Parsappony—Troy Hills Township*, 89 A.2d 677 (1952). There the Board said that the full cost of the extension must be financed by the developer—unless he conforms his lots to the Board's specifications. The Court concluded at page 669 that such action constituted an arbitrary distinction be-

tween classes without rational thought to support it:

> *"The action followed by the local authority was arbitrary and unreasonable . . . The provision of water for the public and private uses of the municipality and its inhabitants is the exclusive province of the local agency; and it is elementary that the exercise of the power be in all respects fair and reasonable and free from oppression. There can be no invidious discrimination in the extension of the service thus undertaken by the municipality as a public responsibility. Equal justice is of the very essence of the power. Impartial administration is the controlling principle. The rule of action must apply equally to all persons similarly circumstanced. There is a denial of the equal protection of the law unless the water service be available to all in like circumstances upon the same terms and conditions . . . Persons situated alike shall be treated alike."* 89 A.2d at 669.

This principle controlled when the New Jersey Supreme Court extended the *Reid* case to cover the identical situation presented in this application! The city could not require a new developer to finance an extension when part of the prior extensions were financed by the Authority. *Rutan Estates, Inc. v. Town of Belleville*, 152 A.2d 853 (N.J., 1959).

As recently as 1961 the Missouri Supreme Court in *Filger v. Public Water Supply*, 346 S.W.2d 567, 573, expressly approved and adopted the reasoning of the foregoing New Jersey cases.

Another holding following the same analysis as the case on application is *City of DePere v. Public Service*

Comm., 63 N.W.2d 764 (Wis., 1954). There the Wisconsin Supreme Court nullified a city ordinance which attempted to collect fees from abutting owners to recoup the cost of newly laid water mains. The Court reasoned that new customers would have to pay far in excess of what old customers were paying for their water service, i.e., new customers would have to pay construction costs *plus* monthly water charges, where the old customers would *only* have to pay the monthly water charges.

And now a Texas Court of Civil Appeals, affirmed by the Texas Supreme Court by a ruling of no reversible error, upholds this arbitrary and capricious decision by answering the Petitioner's legal arguments with a simple "We think not." (See Appendix B)

The result — a nationwide problem. Developers, many conducting interstate activities, must now face this question in every state in the Union. Needless to say local authorities in the future will attempt to place the cost of extensions on outside developers, to the benefit of the local homeowners. Since split decisions now exist, the developer could easily be forced to pay the high cost of litigation in each of the remaining forty-six jurisdictions. Nationwide development problems exist over this question and those problems will become accentuated unless this Court resolves the conflict that exists between the jurisdictions.

III. *The authority disobeyed the rulings of this Court by failing to even consider the Developer's application.*

The Benbrook Water and Sewer Authority deliberately ignored the requirement of Procedural Due Process as the Authority admittedly chose to ignore Developer's application (T.R. 311, 312, 321). No hearing—no discussion—no consideration whatsoever took place in regard to the Developer's application. This action constitutes a flagrant abuse of Procedural Due Process which embraces "all those rights which courts must enforce because they are basic to a free society." *Wolfe v. People of State of Colorado*, 338 U.S. 25, 27 (1949).

There is no question that Procedural Due Process extends to and protects the citizens from the Benbrook Water and Sewer Authority.

> "*In administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand a 'fair play and open hearing' — essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard'.*" *Morgan v. United States*, 304 U.S. 13 (1937) at page 15.

In making this financial assessment without granting the Developer the opportunity to be heard, the Authority disobeyed the direct command of this Court. The Court repeatedly held that when a state board desires to make local assessments against landowners for services rendered by the board, then the landown-

ers possess the right to be heard as to the validity and the amount of those assessments.

The board in *Londoner v. Denver*, 210 U.S. 373 (1908) assessed Plaintiff's land for the cost of paving a street, giving the landowner opportunity to file written complaint and objctions, but not the opportunity to be heard. The Court stated at page 386:

> *"If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law . . . (A) hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal."*

The question of how much must be paid for a water and sewerage extension is similar to the question of how much must be made for a local assessment.

> *"Where the intended use is public, the necessity and expedience of the taking may be determined by such agency and in such mode as the State may designate. They are legislative questions no matter who may be charged with their decision, and a hearing thereon is not essential to due process . . . ."*
>
> * * *
>
> ***"But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard."*** *Bragg v. Weaver*, 251 U.S. 57, 58-59 (1919).

But what if the developer requested, as here, the extension of the service for which the Authority seeks payment. Irrelevant — the question still remains what fee must the property owner pay for the extension of a given service. This court so held in *Browning v. Hooper*, 269 U.S. 396, 405-406, (1926), where the taxpayer contested an assessment made on his land after the populace of the country requested the road improvement.

> *"But it is essential to due process of law that such owners be given notice and oportunity to be heard on that question where, as here, the district was not created by the legislature, and there has been no legislative determination that their property will be benefited by the local improvement. Appellants were denied all oportunity to be heard. No officer or tribunal was empowered by the law of the state to hear them, or to consider and determine whether the road improvement in question would benefit their lands. The act is repugnant to the due process of law clause of the Fourteenth Amendment."*

And so it should be here. Not only is the assessment of a local nature, but it is solely on the property of the Developer. The property is his — the cost will be his — the potential loss will be his — yet his position on his own destiny is not even given the courtesy of an ex parte hearing.

> *"When it is proposed to take from a citizen through administrative proceedings some right which he otherwise would have, it has always been held that the constitutional requirement is that he shall be afforded notice and an oppor-*

> *tunity to be heard. The demands of due process do not require a hearing at the initial stage or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." Parker v. Hester*, 227 F.2d 708, 716 (9th Circuit, 1955).

If this gross deviation from the norms of Procedural Due Process stands, every bureaucrat who considers his agency a power unto itself will rejoice. For those who allow a decision, casually made, to move by the force of time into the rut of habit and from there into the sacred role of an "Administrative Rule", the procedure will seem ideal. This Court must dissolve the insulation currently surrounding the decision making process of this Authority, which is currently immune from the effects of fresh thought and innovation.

CONCLUSION

The trial court incorrectly held that the Authority could require the Developer to pay for all extensions and then deliver a fee title to the Authority all without compensation. Even if such action failed to constitute such an unconstitutional taking, its discriminatory aspect of favoring a local landowner over the outside developer and favoring prior subscribers over current subscribers clearly denied the Developer the Equal Protection of the Laws. These errors were compounded by the Authority's nonchalant refusal to even hear the Petitioner's position in regard to the disposition of his own property. The trial court and the Court of Civil Appeals have erred in holding to the contrary, and the

Supreme Court of Texas has erred in refusing to consider the case upon the statement that the error of the Court of Civil Appeals is not reversible. Writ of certiorari should be granted and the Court of Civil Appeals and the trial court reversed under the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,

HOOPER, STEVES & KERRY
200 Fort Worth Club Building
Fort Worth, Texas 76102

By: Henry E. Kerry
Henry E. Kerry

By: David F. Chappell
David F. Chappell

Attorneys for Petitioner

NIEMANN & NIEMANN
505 International Life Building
Austin, Texas

LARRY NIEMANN, *Of Counsel*
Attorneys for Texas Association of Home Builders, Inc.

Copies of this Petition for Writ of Certiorari have been served as provided by Rule 33 by personal delivery to Counsel or a Clerk in the office of Mr. Cue Lipscomb, 1701 Commerce Building, Fort Worth, Texas, this 18 day of June, 1968.

Henry C. Harris

Of Counsel for Petitioner

EXHIBIT A

No. 40754-C

IN THE DISTRICT COURT
TARRANT COUNTY, TEXAS
96th JUDICIAL DISTRICT

DUANE JOHNSON

vs.

BENBROOK WATER & SEWER AUTHORITY

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On March 8, 1966, the above entitled and numbered cause came on regularly for trial. Both Plaintiff and Defendant appeared in person and by and through their respective duly appointed attorneys of record. Trial by jury having been duly waived by the parties, matters of fact as well as of law were submitted to the Court for trial. After considering the pleadings, hearing the evidence, stipulations, briefs, and arguments of counsel, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Defendant, Benbrook Sewer and Water Authority, was created as a governmental agency and a body politic and corporate under and by virtue of Article 8280—163 of Vernon's Annotated Civil Statutes of Texas, which Article was an act passed by the 54th Legislature of this State in 1955.

2. The Defendant obtains its authority and powers

to operate under Article XVI, Section 59 of the Texas Constitution and from the above mentioned Article creating said Defendant, and its possesses all of the rights, power and privileges conferred by the General Laws of this State applicable to water control and improvement districts created under the above mentioned Article and Section of The Texas Constitution.

3. At the time of its creation, the Defendant's boundaries were identical with those of the village of Benbrook, Tarrant County, Texas.

4. The Plaintiff, Duane Johnson, is a person primarily engaged in purchasing, sub-dividing, improving and reselling real estate located within the Defendant's boundaries, and he has been so engaged since before the Defendant was created.

5. Shortly after its creation, the Defendant duly adopted a policy of requiring all builders, sub-dividers and developers, of which Plaintiff was one, to pay the entire cost of extending the Defendant's existing sewer and water systems to and through any new area being developed by such developer and for which the developer had requested water and sewer service from the Defendant. Such planned extensions of the Defendant's systems were required to be designed or approved by the Defendant's engineer, and prior to the commencement of construction of such extensions the developer was required to deposit the entire cost thereof with the Defendant. The actual extension is accomplished in the name and by authority of the Defendant; and upon completion of construction and acceptance by the Defendant; it is expressly under-

stood that the title to the extension vests in the Defendant.

6. In addition to the extensions of the Defendant's systems which are under its policies required to be paid by developers such as Plaintiff, the Defendant has at all times paid the entire cots of other substantial capital improvements necessary to provide and maintain adequate water and sewer service for persons residing within its boundaries; all of such additional capital improvements being paid for by Defendant without contribution from developers. Such capital improvements include but are not limited to water supply, treatment and storage facilities, large trucks, distribution and collector lines and sewerage treatment facilities. In addition to such capital improvements, the Defendant also bears the entire cost of maintaining and replacing all facilities, whether initially paid for by developers or by the Defendant.

7. Even with the developers paying for the extensions required of them under the Defendant's policies and procedures, the Defendant has steadily increased its indebtedness since its creation.

8. The extensions which the Defendant's policies require developers to pay for have some of the characteristics of both an asset and a liability. Although each such extension provides the Defendant with additional customers, the Authority also at the same time receives water and sewer systems which must be maintained. Also, the water lines must be kept supplied with water and sewerage collected must be treated and disposed of.

declines to make any exception to its policies and procedures as requested by Plaintiff.

Thereafter, as required by Defendant's said policies, Plaintiff deposited the sum of $5,214.00, the entire cost of extending the water and sewer facilities, which are also the subject matter of this lawsuit. Contemporaneously with the deposit of said sum by Plaintiff with Defendant, Plaintiff executed the required Developer-Authority agreement regarding the involved extension and notified the Defendant that such contract was being executed and such deposit made without prejudice to his right to obtain the reimbursement he had previously requested of the Defendant.

13. Thereafter, the subject extensions of water and sewer lines into the area involved were made in the name and by authority of the Defendant and such extension was paid for by Defendant using the sum deposited by Plaintiff.

14. The Plaintiff, as a sub-divider and developer, customarily pays the entire cost of the paving of streets and the installation of curbs and gutters in areas developed by him, and amount expended for such purposes are added to his expense in extending water and sewer lines into such areas. The total of such expenditures by Plaintiff is customarily divided by the number of tracts of land to be sold within such improved area and added to the sale price of such tracts.

It is uncontradicted that the extensions of the water and sewer facilities, like the curbs, gutters and paved streets, increases the value of the tracts of property located within the area so developed.

9. The Plaintiff has purchased, developed and resold land within the Defendant's boundaries on many occasions before the development which is the subject of this lawsuit, and the extensions of water and sewer lines to such areas previouly developed by Plaintiff were accomplished under the same policies and procedures of which he complains in the case at bar.

10. The Plaintiff is the owner, sub-divider and developer of a tract of land known as Blocks 56, 57, and 58 and portions of Blocks 54 and 55 in Lakeside Addition to the City of Benbrook, Tarrant County, Texas, the development of which tract is the subject matter of this lawsuit, and all of which land is located entirely within the territorial limits and boundaries of the Benbrook Sewer and Water Authority.

11. On June 1, 1965, the Plaintiff made a formal application through his attorney asking the Defendant to make an exception to said Defendant's policies and procedures by either paying for the entire cost of extending water and sewer lines into the above described area or to reimburse Plaintiff in whole or in part in the event he was required to pay for the extension. At the same time, the Plaintiff also requested that the "tap fee" which is charged by the Defendant for each connection to cover the cost of obtaining and installing a meter be waived for the Plaintiff.

12. The Defendant, acting by and through its Board of Directors considered the Plaintiff's request and through its counsel notified Plaintiff that Defendant

15. It is also uncontradicted that the Plaintiff had prior to trial of this case already recovered in the sale price of each tract of property which had been previously sold within the involved area the pro rata share of the total cost of extending the water and sewer systems into said area allocable to each of said tracts. The Plaintiff also testified that he will recover the remainder of his cost regarding such water and sewer extensions when the remaining tracts within the developed area are sold.

16. None of the persons to whom the cost of these water and sewer extensions have been shifted by Plaintiff are parties to this lawsuit.

17. In addition to the fact that the same policies and procedures here complained of by Plaintiff have been previously applied to him, the same policies have been uniformly applied to oher persons who have developed property within the Defendant's boundaries.

18. Regarding the tap fee charged by Defendant to cover the cost of purchasing and installing water meters in developed areas, which fee is also complained of herein by Plaintiff, such fee has been uniformly paid by developers since the Defendant's creation, except that such fee was waived by the Defendant, for the Plaintiff ony, during the infancy of the village of Benbrook in order to encourage speedier sub-division and development of property.

19. The Plaintiff was not damaged, irreparably or otherwise, by the Defendant's action herein complained of, nor will he be so damaged thereby.

CONCLUSIONS OF LAW

1. The Defendant was authorized under the statutes creating Benbrook Water & Sewer Authority, the general law pertaining to water control and improvement districts and under the Constitution of the State of Texas to adopt the rules and regulations herein complained of by Plaintiff.

2. The Plaintiff is not entitled to a Writ of Mandamus under the facts of this case, because the matters complained of by Plaintiff are discretionary in nature.

3. The Plaintiff is not entitled to a Declaratory Judgment as prayed for by said Plaintiff, under the facts of this case.

4. The Defendant's policies and procedures which have been in effect at all times material to this law suit are not arbitrary, unreasonable, capricious and/or discriminatory.

5. There has been no discrimination in the manner in which the Defendant's policies and procedures have been applied to the Plaintiff.

6. There has been no confiscation of Plaintiff's property by Defendant without due process of law.

7. The Plaintiff has not been denied by Defendant equal protection of the law.

8. The Defendant's action herein complained of by Plaintiff does not amount to an abuse of discretion on the part of said Defendant.

SIGNED this 5 day of May, 1966.

John T. Denny
JUDGE PRESIDING

EXHIBIT B

NO. 16773

IN THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

DUANE JOHNSON, *Appellant*

vs.

BENBROOK WATER AND SEWER AUTHORITY, *Appellee*

FROM THE DISTRICT COURT OF TARRANT COUNTY

OPINION

This is a suit for declaratory judgment pursuant to Article 2524-1, V. A. T. S., and an ancillary writ of mandamus. It contains a prayer for refund of all monies expended for extension of water and sewer services to an addition. It was tried to the court without a jury and resulted in judgment denying all relief sought by the plaintiff (appellant).

The appellant by his points 1-37 contends that he has been denied substantive and procedural due process and equal protection of the law. Points 38-42 relate to tap fees, 43-46 his damages and 47 through 49 to the appropriateness of the relief sought by him.

We affirm.

Findings of fact and conclusions of law were made and filed as follows: "1. The Defendant, Benbrook

Sewer and Water Authority, was created as a governmental agency and a body politic and corporate under and by virtue of Article 8280—163 of Vernon's Annotated Civil Statutes of Texas, which Article was an act passed by the 54th Legislature of this State in 1955.

"2. The Defendant obtains its authority and powers to operate under Article XVI, Section 59 of the Texas Constitution and from the above mentioned Article creating said Defendant, and it possesses all of the rights, power and privileges conferred by the General Laws of this State applicable to water control and improvement districts created under the above mentioned Article and Section of The Texas Constitution.

"3. At the time of its creation, the Defendant's boundaries were identical with those of the village of Benbrook, Tarrant County, Texas.

"4. The Plaintiff, Duane Johnson, is a person primarily engaged in purchasing, sub-dividing, improvng and reselling real estate located within the Defendant's boundaries, and he has been so engaged since before the Defendant was created.

"5. Shortly after its creation, the Defendant duly adopted a policy of requiring all builders, sub-dividers and developers, of which Plaintiff was one, to pay the entire cost of extending the Defendant's existing sewer and water systems to and through any new area being developed by such developer and for which the developer had requested water and sewer service from the Defendant. Such planned extensions of the De-

fendant's systems were required to be designed or approved by the Defendant's engineer, and prior to the commencement of construction of such extensions the developer was required to deposit the entire cost thereof with the Defendant. The actual extension is accomplished in the name and by authority of the Defendant; and upon completion of construction and acceptance by the Defendant; it is expressly understood that the title to the extension vests in the Defendant.

"6. In addition to the extensions of the Defendant's systems which are under its policies required to be paid by developers such as Plaintiff, the Defendant has at all times paid the entire cost of other substantial capital improvements necessary to provide and maintain adequate water and sewer service for persons residing within its boundaries; all of such additional capital improvements being paid for by Defendant without contribution from developers. Such capital improvements include but are not limited to water supply, treatment and storage facilities, large trucks, distribution and collector lines and sewerage treatment facilities. In addition to such capital improvements, the Defendant also bears the entire cost of maintaining and replacing all facilities, whether initially paid for by developers or by the Defendant.

"7. Even with the developers paying for the extensions required of them under the Defendant's policies and procedures, the Defendant has steadily increased its indebtedness since its creation.

"8. The extensions which the Defendant's policies

require developers to pay for have some of the characteristics of both an asset and a liability. Although each such extension provides the Defendant with additional customers, the Authority also at the same time receives water and sewer systems which must be maintained. Also, the water lines must be kept supplied with water and the sewerage collected must be treated and disposed of.

"9. The Plaintiff has purchased, developed and resold land within the Defendant's boundaries on many occasions before the development which is the subject of this lawsuit, and the extensions of water and sewer lines to such areas previously developed by Plaintiff were accomplished under the same policies and procedures of which he complains in the case at bar.

"10. The Plaintiff is the owner, sub-divider and developer of a tract of land known as Blocks 56, 57, and 58 and portions of Blocks 54 and 55 in Lakeside Addition to the City of Benbrook, Tarrant County, Texas, the development of which tract is the subject matter of this lawsuit, and all of which land is located entirely within the territorial limits and boundaries of the Benbrook Sewer and Water Authority.

"11. On June 1, 1965, the Plaintiff made a formal application through his attorney asking the Defendant to make an exception to said Defendant's policies and procedures by either paying for the entire cost of extending water and sewer lines into the above described area or to reimburse Plaintiff in whole or in part in the event he was required to pay for the extension. At the same time, the Plaintiff also requested that the

"tap fee" which is charged by the Defendant for each connection to cover the cost of obtaining and installing a meter be waived for the Plaintiff.

"12. The Defendant, acting by and through its Board of Directors considered the Plaintiff's request and through its counsel notied Plaintiff that Defendant declines to make any exception to its policies and procedures as requested by Plaintiff.

"Thereafter, as required by Defendant's said policies, Plaintiff deposited the sum of $5,214.00, the entire cost of extending the water and sewer facilities, which are aso the subject matter of this lawsuit. Contemporaneously with the deposit of said sum by Plaintiff with Defendant, Plaintiff executed the required Developer-Authority agreement regarding the involved extension and notified the Defendant that such contract was being executed and such deposit made without prejudice to his right to obtain the reimbursement he had previously requested of the Defendant.

"13. Thereafter, the subject extensions of water and sewer lines into the area involved were made in the name and by authority of the Defendant and such extension was paid for by Defendant using the sum deposited by Plaintiff.

"14. The Plaintiff, as a sub-divider and developer, customarily pays the entire cost of the paving of streets and the installation of curbs and gutters in areas developed by him, and amounts expended for such purposes are added to his expense in extending water and sewer lines into such areas. The total of

such expenditures by Plaintiff is customarily divided by the number of tracts of land to be sold within such improved area and added to the sale price of such tracts.

"It is uncontradicted that the extensions of water and sewer facilities, like the curbs, gutters and paved streets, increases the value of the tracts of property located within the area so developed.

"15. It is also uncontradicted that the Plaintiff had prior to trial of this case already recovered in the sale price of each tract of property which had been previously sold within the involved area the pro rata share of the total cost of extending the water and sewer systems into said area allocable to each of said tracts. The Plaintiff also testified that he will recover the remainder of his cost regarding such water and sewer extensions when the remaining tracts within the developed area are sold.

"16. None of the persons to whom the cost of these water and sewer extensions have been shifted by Plaintiff are parties to this lawsuit.

"17. In addition to the fact that the same policies and procedures here complained of by Plaintiff have been previously applied to him, the same policies have been uniformly applied to other persons who have developed property within the Defendant's boundaries.

"18. Regarding the tap fee charged by Defendant to cover the cost of purchasing and installing water meters in developed areas, which fee is also complained of herein by Plaintiff, such fee has been uni-

formly paid by developers since the Defendant's creation, except that such fee was waived by the Defendant, for the Plaintiff only, during the infancy of the village of Benbrook in order to encourage speedier sub-division and development of property.

"19. The Plaintiff was not damaged, irreparably or otherwise, by the Defendant's action herein complained of, nor will he be so damaged thereby.

"CONCLUSIONS OF LAW

"1. The Defendant was authorized under the statutes creating Benbrook Water & Sewer Authority, the general law pertaining to water control and improvement districts and under the Constitution of the State of Texas to adopt the rules and regulations herein complained of by Plaintiff.

"2. The Plaintiff is not entitled to a Writ of Mandamus under the facts of this case, because the matters complained of by Plaintiff are discretionary in nature.

"3. The Plaintiff is not entitled to a Declaratory Judgment as prayed for by said Plaintiff, under the facts of this case.

"4. The Defendant's policies and procedures which have been in effect at all times material to this law suit are not arbitrary, unreasonable, capricious and/or discriminatory.

"5. There has been no discrimination in the manner in which the Defendant's policies and procedures have been applied to the Plaintiff.

"6. There has been no confiscation of Plaintiff's property by Defendant without due process of law.

"7. The Plaintiff has not been denied by Defendant equal protection of the law.

"8. The Defendant's action herein complained of by Plaintiff does not amount to an abuse of discretion on the part of said Defendant." As to findings by the court and its conclusions of fact and law see Rules 296-299, T. R. C. P., both inclusive, and authorities cited thereunder. There is competent evidence to support the court's findings and its judgment.

Admittedly, most of the facts of this case are undisputed. It occurs to us that there is only one question to be resolved and that simply stated is whether or not the appellee has the constitutional and statutory authority to require the developer to extend the water and sewer extensions at his own expense. We are of the opinion that the trial court did not err in holding that it does have such authority.

The appellant presents the question to be adjudicated in much the same language as follows: "Does the policy of the authority in requiring a developer to pay the entire cost of water and sewer extensions into a new area without compensation and without reimbursement constitute an appropriation or a taking of the developer's property without due process of law, and does the implementation of that policy to the developer in this case deny to him equal protection of the law?" We think not.

City of Snyder v. Bass, 360 S.W. 2d 426 (Eastland

Civ. App., 1962, Ref., n.r.e.); Hightower v. City of Tyler, 134 S.W. 2d 404 (El Paso Civ. App., 1939, ref.); Moser v. Greenland Hills Realty Co., 300 S.W. 177 (Dallas Civ. App., 1927, ref.); see also 48 A. L. R. 2d 1224 and cases cited. All points of error are overruled and judgment of the trial court is in all things affirmed.

DEC. 16, 1966

/s/ Jack M. Langdon
Associate Justice

EXHIBIT C

IN THE SUPREME COURT OF TEXAS

April 3, 1968

No. B-129

From Tarrant County, Second District

DUANE JOHNSON

vs.

BENBROOK WATER & SEWER AUTHORITY

Application of petitioner for writ of error to the Court of Civil Appeals for the Second Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Duane Johnson and sureties, Henry E. Kerry and Winfred Hooper, Jr., pay all costs incurred on this application.

EXHIBIT D

SECTION (III)

SINGLE CUSTOMERS OR GROUPS OF SINGLE CUSTOMERS REQUIRING SYSTEM EXTENSIONS

This section of the Authority's Policies shall apply to Single Customers or Groups of Single Customers requiring system extensions to satisfy the requirements of Point of Service for connection to the Authority's water or sewerage systems.

No Single Customer or Groups of Single Customers shall be eligible for classification under the section of the policies, unless the customer or customers are independent of sponsored development.

The benefits of this section are not available to Developers. The Board shall determine the classification of the applicant and the findings of the Board shall be final.

Extension of the Authority's water or sewerage systems or both under the provisions of this section of the policies shall be at the discretion of the Manager. The entire costs of the extensions shall be paid by the customers whose service lines are directly connected to the extensions.

Sewerage service is not available from the Authority's sewage collecting system unless water service is presently being furnished or has been applied for from the Authority's water distribution system. Where one or more Single Customer desires that the

Authority extend either its water or sewerage systems or both to satisfy the requirements of Points of Service for their property, they shall make their request to the Manager in writing stating the lot and block number, name of subdivision and street address of the property to be served and the type or types of service required. Each request shall be signed by all property owners initially requesting service and their signatures shall be identified with the property they desire to be served. Upon receipt of such request, the Manager will instruct the Engineer to prepare an estimate of the entire cost of the extensions which shall include an allowance of ten (10%) percent of such costs to cover the costs of administration, field surveys and contingencies. The amount thus determined shall be the sum of the cost prescribed under Section II of these policies entitled "Single Customer Connection to Existing System" plus the cost of extending the water or sewerage system or both, as requested. This total cost shall be equitably prorated to each Single Customer whose name appears on the request in the proportion that his front footage bears to the total front footage of all applicants whose name appears on the list.

Where intermediate property owners, between the last previous Point of Service and the extended Point of Service, request and pay for service within a period of twenty (20) years from the date of completion of the original extension, refunds will be made to the Single Customers who paid for the original extension in an amount of, but not exceeding, their adjusted cost of the extension as determined by dividing the cost of the extension by the total property front foot-

age served and multiplying the quotient by the Single Customer's own property front footage.

The initial cost to each Single Customer requiring system extensions would therefore be Seventy-Five ($75.00) Dollars for water and Fifty ($50.00) Dollars for sewerage connection plus the applicable costs of street repair for the Service Lines, plus that Single Customer's equal portion of the costs of extending the Water Distribution Main or Lateral Sewer, or both, but this initial cost will be reduced by refunds from payments made to the Authority by intermediate customers who connect directly to the extension. No refunds shall exceed the amount of the Single Customer's original participation in the cost of the extension, less the cost properly chargeable to property owned by him and no refunds will be made after the expiration of twenty (20) years after completion of the extenion.

The amount to be charged intermediate Single Customers who connect to the extension paid for by others in addition to the standard connection charges for connections to existing mains installed by the Authority and the amount to be refunded to the original participants shall be determined by dividing the cost of the extension by the total property front footage served and multiplying the quotient by the new intermediate Single Customer's property front footage.

Refunds will be made annually during the last two months of each calendar year for collections made by the Authority for intermediate Single Customer connections to the system extensions during the preceding fiscal year for the Authority.

Each Single Customer requiring system extensions under this section of the Authority's policies shall execute a written agreement with the Authority setting forth in detail the location, extent, total and Single Customer cost of the extension, and the name and address of the person to whom any refunds are payable. Once each year the Authority will make payment to the person designated on the agreement in the amount of any refund that may be due, however, the Authority shall not be liable for any interest on any such fund due.

The Authority will not be required to start any construction of system extension and no connection shall be made to the Authority's water or sewerage systems until each Single Customer requesting connection to the extension has made full payment or satisfactory arrangements for time payments, as hereinafter provided, to the Authority for his proportionate share of the costs as established above. The water meter deposit and sewerage service deposit shall be paid in full before the connection is made.

All extensions of water or sewer mains shall be and become the sole property of the Authority.

REPLY TO PETITION FOR WRIT OF CERTIORARI

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 217

DUANE JOHNSON, *Petitioner*

vs.

BENBROOK WATER AND SEWER AUTHORITY, *Respondent*

Repondent's Reply to Petition for Writ of Certiorari to The Supreme Court of Texas and Second Court of Civil Appeals of Texas

LIPSCOMB & RENFRO
1701 Commerce Building
Fort Worth, Texas 76102
CUE LIPSCOMB
Attorney for Respondent

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-4070

TABLE OF CONTENTS

Page

REPLY TO PETITION FOR WRIT OF CERTIORARI:

JURISDICTION 1

Statement of the Case 2

Questions Presented for Review 7

Argument—Reasons for Refusing Writ:

I. The Authority's action requiring the Developer to pay for all costs of extensions of water and sewer lines within his subdivisions, without reimbursement for the costs thereof, amounts to nothing more than requiring his performance in a contract executed for the mutual benefit of Mr. Duane Johnson and the residents of Benbrook who buy real estate from him. Just because Mr. Johnson is required to perform his end of the contract, for which he receives *quid pro quo*, does not amount to a "taking" either with or without compensation, as prohibited by the Fourteenth Amendment to the United States Constitution 8

II. The Authority's action did not deny the Developer the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States 12

III. The Authority gave full consideration to Petitioner's application for reimbursement of the charges required of him as a Developer of a new area 14

CONCLUSION 16

Certificate of Service 17

REPLY TO PETITION FOR WRIT OF CERTIORARI

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 217

DUANE JOHNSON, *Petitioner*

vs.

BENBROOK WATER AND SEWER AUTHORITY, *Respondent*

Repondent's Reply to Petition for Writ of Certiorari to The Supreme Court of Texas and Second Court of Civil Appeals of Texas

---

Respondent, Benbrook Water and Sewer Authority, respectfully prays that this Honorable Court refuse to issue a writ of certiorari to review the opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and order of the Supreme Court of Texas refusing to review said opinion upon application for writ of error.

JURISDICTION

This Court has jurisdiction under 28 U.S.C., Sec. 1257 (3), in that Petitioner claims a violation by Respondent of the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States.

The Petitioner's petition was filed within 90 days after the Supreme Court of Texas refused Petitioner's application for writ of error to the Court of Civil Appeals for the Second Supreme Judicial District of Texas as required by 28 U.S.C. Sec 2101 (c), thereby exhausting Petitioner's state remedies.

STATEMENT OF THE CASE

Because of the narrow and slanted viewpoint presented by Petitioner in his statement of the nature of this case, it will be necessary here to go into a more detailed treatise than is usually necessary in a reply of this nature in order for this Honorable Court to be able to see the entire picture. Also, unlike Petitioner's statement, Respondent will reserve its argument for the proper heading hereunder.

As stated by Petitioner, Benbrook Water & Sewer Authority was created by act of the Texas Legislature in 1955. It was created solely as a financing entity to purchase, improve and operate the water system then being operated by the Authority's predecessor, Worth Water Company.

The Respondent is a nonprofit governmental body corporate and politic. Its policies are formulated by a Board of Directors composed of five elected citizens selected from and by the qualified voters residing within the City of Benbrook, Texas, and within the limits of the Authority.

Since its inception in 1955, and during the eleven years of its operation before the trial of this lawsuit, the Authority has been forced to go deeper into debt

with three different bond issues (SF 242), each larger than the last, and at the time of the trial hereof was applying for its fourth and largest bond issue, (SF 233).

It is significant that the Authority's operations are financed entirely out of revenues, and its bond issues were revenue bonds rather than tax bonds. Its only source of revenue are the monthly charges billed to customers for water consumed and for sewerage collection, treatment and disposal. Out of these revenues, the Authority must not only retire its bonded indebtedness at the required rate, but it must also meet the costs of providing and maintaining an adequate water supply and sewerage treatment and disposal facilities.

Immediately after its creation, Benbrook Water & Sewer Authority adopted a policy whereby builders, sub-dividers and developers such as the Petitioner Duane Johnson are required to pay for the entire costs of water and sewer lines within each new development without any reimbursement to the developer for such payments, except in certain instances not in issue here. The Courts below correctly found that although there was an assemblying and recodification of the Authority's policies and procedures in 1965, approximately one year before this case was tried, that there was no significant change in the policies hereunder attacked by the Petitioner. The Courts below have also found that this policy has been strictly adhered to by the Authority's Board of Directors and that there has been no discrimination against the Petitioner in the application of these policies.

Duane Johnson is a speculative developer, (SF 204). He blames the Federal Reserve system for raising the discount rate and causing him to take a loss on some of his lots, (SF 198). Developer purchased a 300-acre tract including the subdivision which is the subject matter of this lawsuit in 1953 for $750.00 per acre, (SF 185-186). Within this subdivision the acreage has been divided into lots containing from one-third to one-half acre each, most of which were selling for $1750.00 each at the time of the trial of this lawsuit, (SF 186-187).

Mr. Johnson admitted that the water and sewer lines installed within his developments increase the value of the property within his development, (SF 190). The portion of the costs of water and sewer facilities borne by the developer under the Authority's policies and procedures, like all of the other costs of improving the raw land such as the costs of curbs, gutters and paving, is prorated over the number of lots within each subdivision, said costs being ultimately recovered from persons who purchase those lots from the Petitioner, (SF 191-194). During the year 1965, Petitioner sold nine lots within the subdivision in question and before the date of trial during 1966 he sold three more; in each case recovering from the respective purchaser of each lot a pro rata costs of all improvements to the raw land, including the costs of water and sewer extensions which he is here attempting to recover again in this lawsuit against Respondent, (SF 193-194). Mr. Johnson anticipates that all 103 lots within the subdivision herein involved will be sold, and in each case he plans to recover the

costs of improving the raw land from the purchaser, (SF 195). Even though the developer has passed the costs of these water and sewer lines along to the purchasers of many of the lots, he does not intend to reimburse these purchasers for their pro rata portions of such recovery, (SF 197-198).

The Petitioner has been developing subdivisions in Benbrook for sixteen years (SF 200), and the Authority's policy with reference to requiring the developer to pay the costs of extending water and sewer lines into their new subdivisions has been in effect since the first policy was outlined by Resolution by the first Board of Directors of August 1, 1955, (SF 298-301). The Authority's present policies and procedures, which are included in the record as Plaintiff's Exhibit No 14, represent no material change in such policy which has existed since the Authority was created, (SF 292).

The Authority's policy with regard to the development of new areas is the same as that customarily followed by other water districts and municipalities, (SF 222-223). As a matter of fact, there is a definite trend in such other districts and municipalities to require developers to participate to a greater extent, not only in the distribution system as required by the Authority, but also in the production and storage facilities, (SF 223). In the formulation of such policies, concepts laid down by other water districts and municipalities in other areas of the State of Texas were followed, (SF 110-112). Experience has shown that water and sewer revenues are sufficient only to pay

for water supply, treatment and storage facilities; and sewerage treatment and disposal facilities, thereby necessitating this trend on the part of water districts and municipalities since World War II toward a no-reimbursement policy regarding developers of new subdivisions, (SF 112-113).

It can not be disputed that the water and sewer lines for which Petitioner is here seeking reimbursement are both asset and liability in nature. These lines are an asset to the property served by them, for which asset Mr. Johnson receives full payment when he sells a lot. They are a liability to Benbrook Water & Sewer Authority in that each new water line installed by Mr. Johnson must be maintained and supplied with water at an adequate pressure. The sewer lines are a liability because the sewerage collected through this network must be treated and disposed of by the Authority.

Over and above the costs of water and sewer lines ultimately paid for by the purchaser of a new home or lot, thes Authority must still provide the funds to pay for sewerage treatment plants, development of water supplies, out-fall sewer collector systems, strengthening and maintenance of the interior portions of both water and sewer systems in order to handle an ever-increasing consumer demand and storage facilities to provide for fire protection and peak demands on water supply, (SF 117-118).

It can not be disputed that no reimbursement for developers would be possible without increasing the Authority's charges to their customers or a tax levied

against the residents and customers of the Authority. This is underscored by the fact that the Authority has gone deeper into debt each year of its operation, even though it makes no profit and its Directors serve for a salary of $10.00 per month each. An increase in rates or additional taxes would, in effect, require the Authority's customers to pay for water and sewer lines installed in new developments, when they have already paid their fair and pro rata share of such costs at the time they purchased their home or lot. This is the thanks Petitioner would show for persons who have purchased real estate from him in the past.

Questions Presented

QUESTIONS PRESENTED FOR REVIEW

If indeed the Petitioner has presented and preserved points of error of the Courts below regarding his constitutional rights under the Fourteenth Amendment of the Constitution of the United States, such questions can be but remotely related to the "questions presented for review" as stated on pages 2 and 3 of Mr. Johnson's petition. Because of the fact that neither question (2) nor question (3) were raised in the Courts below, such questions will not be treated here.

Therefore, the only question here presented for a review before this Honorable Court is that germane to the points 19, 23 and 35 assigned both in the Court of Civil Appeals for the Second Supreme Judicial District of Texas and the Supreme Court of Texas; said

points being summarized as follows.

> "Does the portion of the Respondent's policies and procedures requiring developers to pay the entire costs of the extension of the Authority's water and sewer lines to and through his new subdivisions deprive said Petitioner of his property, 'without due process of law' or deny him 'the equal protection of the laws.' "

ARGUMENT — REASONS FOR REFUSING WRIT

For the sake of continuity of Respondent's argument will be arranged and numbered in reply to that of the Petitioner.

I. *The Authority's action requiring the Developer to pay for all costs of extensions of water and sewer lines within his subdivisions, without reimbursement for the costs thereof, amounts to nothing more than requiring his performance in a contract executed for the mutual benefit of Mr. Duane Johnson and the residents of Benbrook who buy real estate from him. Just because Mr. Johnson is required to perform his end of the contract, for which he receives* quid pro quo, *does not amount to a "taking" either with or without compensation, as prohibited by the Fourteenth Amendment to the United States Constitution.*

The passion and prejudice of Petitioner's argument is illustrated by his repeated use of the term "bureaucrat" and "bureaucracy" when referring to the Authority's employees and actions. He is obviously overlooking the fact that as a governmental body, the

Authority is nothing more nor less than the residents of the City of Benbrook, who are his customers.

When Mr. Johnson went to the office of Benbrook Water & Sewer Authority to make application for the extension of water and sewer lines through his new subdivision, he was admittedly bargaining for a water supply and sewerage collection and treatment facilities. Even Mr. Johnson testified that the availability of these facilities increased the value of his property and enabled him to sell his houses and lots for more than the price he could get without such facilities, (SF 190). It is the availability of this same water supply and sewerage treatment and disposal facilities which is the consideration furnished by the Authority, and which inures to the benefit of Petitioner by enabling him to recover the costs of these water and sewer lines from the persons who purchase property from him. When Mr. Johnson makes application under these same policies requiring him to pay the costs of extending these lines, as he had done for some sixteen years at the time of trial hereof (SF 200), he was deprived of nothing. He was merely purchasing an immediate benefit in the form of increased value to his property. This immediate benefit ultimately inured to the benefit of persons who purchased property within the subdivision in the form of available water and sewer service, and these same persons ultimately pay for the costs of these extensions as a part of the costs of this property.

It is ironic that when Mr. Johnson sues Benbrook Water & Sewer Authority for reimbursement of the

costs of these lines, he is in effect suing his own customers as well as those of other builders, developers and subdividers, on whom the burden of this payment has already been laid when they purchased their property.

The Honorable Fisher T. Denny, Judge of the 96th Judicial District Court in and for Tarrant County, Texas, trial court herein, correctly held that when the Developer made application for the extension of the water and sewer lines, and deposited with the Authority the funds necessary to accomplish such extensions he was not deprived of any of his property without due process of law. The trial court properly held that such payment on the part of the Developer was payment for a valuable service rendered by the Authority —nothing more than the giving of a thing for a thing. This furnishing of water and sewer service to the citizens of Benbrook is necessarily a team undertaking. Developers are not in any way required to partake of this service furnished by the Authority, but if they choose to seek the advantage of this service for their subdivisions they cannot challenge the right of the Authority to impose reasonable conditions upon the furnishing of such services.

It matters not in the slightest who is the owner of the water and sewer lines installed at the Developer's expense. Such water and sewer lines would be worthless without the willingness on the part of the Authority to meet the ever-increasing demand for water supply and sewerage treatment and disposal facilities. The Authority has offered Mr. Johnson the alternative

that he may keep his water and sewer lines and the water and sewer customers he brags about having presented to the Authority on a silver platter. However, he has shunned this offer, apparently being unwilling to spend the horrendous sums of money necessary to meet the ever-increasing demand for water supply and sewerage treatment facilities.

It is very difficult to reply to a brief which assumes a false premise throughout. The false premise in Petitioner's brief is that the Developer is required to install water and sewer lines and then make a present of such installations to the Authority. The fact is that all installations are accomplished in the name and by authority of Benbrook Water & Sewer Authority, and there is never any question as to the ownership thereof. It merely happens that Developers are required for and in consideration of the receipt of water and sewer service for the land they are developing to pay for a portion of such installations.

The Respondent makes no claim to any right to take anyone's property without compensation, and therefore will offer no cases in support of any such right. As the trial court found, and such finding was affirmed by the Texas Intermediate Appellate Court and Texas Supreme Court, the Developer and the Authority each furnish a *quid pro quo* in a contract freely executed for the mutual benefit of both.

II. *The Authority's action did not deny the Developer the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.*

The Respondent is shocked and surprised at the claims made for the first time under the corresponding heading of Petitioner's brief. Such claims not only go outside the record and any claims made in Developer's petition filed in the trial court, but such claims were not even raised in any of the Court's below.

Therefore, for the first time in this Honorable and High Court Mr. Johnson makes the claim that the Authority makes a class distinction between Developers and individual single customers or groups of single customers—a claim which could have been answered quite readily in evidence in the trial court. And because Petitioner has seen fit to go outside the record to raise this question, Respondent will have to go outside the record to answer.

Immediately after its creation by the Texas Legislature and the election of the initial Board of Directors, said Board of Directors on September 6, 1955, passed a Resolution providing Developers within the Benbrok Water & Sewer Authority the same type of reimbursement quoted by Petitioner from Sec. 3 of the Authority's Policies and Procedures (appendix D).

In other words, when an extension of the Authority's existing system by either a single customer or group of customers or a Developer is contemplated to serve intervening property owned by another, whether the extension was accomplished at the request

of those in the single-customer category or a Developer, when the intervening property owners request a tie-on the Authority collects from them their pro rata share of the costs of such extension and reimburses it to the one who financed the extension.

This reimbursement provided for Developers in the first year of the Authority's operation has been followed without exception up to the present time. Ironically, Petitioner has himself received reimbursement under this policy.

The only other denial of "equal protection" claimed by Petitioner on pages 14 and 15 of his brief allude to the fact that on occasion the Authority has used bond funds to make system improvements which have eventually inured to the benefit of one or more Developers.

Admittedly, the Authority's policy with reference to requiring Developers to finance a portion of system extensions into their new subdivision will not dispense with the necessity of financing many system improvements by the Authority out of revenue and bond funds. The City of Benbrook, Texas, was of course not immune to the population explosion which was experienced by most of the rest of our nation. The Authority's Manager and Consulting Engineer testified that it was necessary on occasions to strengthen the Authority's interior systems in order to support outlying growth. They also testified that it has been necessary to replace many of the lines contained in the original purchase from Worth Water Company because of corrosion and other fair wear and tear. It was also neces-

sary approximately one year before the trial hereof to tie together what had initially been two separate water systems in order to provide uniform pressure and consistent water supply throughout the area served.

While it is probably true that if the Authority had not been required to make these expenditures, a part of such expenditures might have fallen on the shoulders of some Developer, not one word of evidence was introduced upon trial hereof to show that any such improvements to the system were at the request of any Developer or was for the purpose of discriminating in favor of any Developer. On the contrary, the only motivation shown was to give better service to the Authority's patrons.

Again, because of the fact that the Authority is not claiming the right to arbitrarily classify and discriminate between classes of persons, no cases will be offered in support of such contention.

III. *The Authority gave full consideration to Petitioner's application for reimbursement of the charges required of him as a Developer of a new area.*

The Respondent is accused on page 21 of Petitioner's brief to have "deliberately ignored the requirement of procedural due process" regarding his application for reimbursement. However, we find once again that the story has been changed to protect the guilty.

Mr. Robert Lee Logan, who was President of the Authority's Board of Directors at the time of the trial

hereof testified that Mr. Johnson's initial request for reimbursement was brought to the attention of the Board of Directors at one of its meetings and said Board gave the request its consideration at a meeting to which Mr. Johnson was invited but failed to appear. After such consideration, the Board denied Mr. Johnson's request (SF 310-312).

The question of procedural due process is obviously only material in cases where the offended party is faced with the "substantial evidence rule" in his appeal to the Courts. In this case, the Petitioner was given a full, fair and complete hearing in the trial court and Court of Civil Appeals, and the action of these Courts was approved by the Supreme Court of Texas by refusing to grant Petitioner's application for writ of error.

It has been pointed out on many occasions to the Petitioner that all meetings of the Authority's Board of Directors are open to the public, and he has on many occasions attended such meetings.

Here again, in this section of his brief, Petitioner assumes a taking "from a citizen through administrative proceedings" and cites authorities for the proposition that such taking cannot be accomplished without a hearing. The Respondent does not argue with this proposition, but merely states that no such taking has befallen Mr. Johnson. It must be here repeated that the trial court correctly held that no such taking was involved in this case and that Mr. Johnson had been afforded full substantive and procedural due process, notwithstanding his claims to the contrary.

Mr. Johnson has been merely pinched by the shoe which requires him to perform his part of a contract bilateral in nature.

CONCLUSION

The Petitioner in his brief cited many authorities for legal propositions as dear to our way of life as are marriage, motherhood and the church. Obviously the Respondent will not undertake any attempt to besmirch these principles.

The fact is that the trial court held that the matters complained of so vociferously by Petitioner just did not in fact occur. Under the Authority's policies, the Developer does not obtain and then be deprived of the extensions which are the subject matter of this lawsuit. He is merely required to pay an amount of money equivalent to the costs of a portion of these installations as a condition precedent, and in payment for the Authority's water and sewer service, upon his application for such service for a new area being developed by him.

He has already admitted in his testimony that he received for this payment a corresponding increase in value of the property within his development, (SF 190). Therefore, he has admittedly received his *quid pro quo*.

The trial court correctly held that the Authority could require such payment from Developers, and that the requirement of such payment was not an unconstitutional taking without compensation, and

amounted to no denial to Petitioner of equal protection of the laws. The trial court and Court of Civil Appeals further correctly held that the Petitioner was not denied procedural due process of law.

The Supreme Court of Texas did not err in refusing to issue writ of error on the grounds that the Courts below committed no reversible error.

WHEREFORE, writ of certiorari as requested in Developer's Petition should be denied.

Respectfully submitted,

LIPSCOMB & RENFRO
1701 Commerce Building
Fort Worth, Texas 76102

By: Cue Lipscomb
Cue Lipscomb
Attorney for Respondent

CERTIFICATE OF SERVICE

Copies of this Reply to Petition for Writ of Certiorari have been served as provided by Rule 33 by personal delivery to Counsel or a Clerk in the office of Mr. Henry E. Kerry, 220 Fort Worth Club Building, Fort Worth, Texas, this 3 day of August, 1968.

Cue Lipscomb
Of Counsel for Respondent